

SOUTH DAKOTA SUPREME COURT

—Traveling Term of Court—



October 8-9, 2025

Knudson School of Law

University of South Dakota, Vermillion, S.D.

9 a.m. CDT



SOUTH DAKOTA
UNIFIED JUDICIAL SYSTEM

Steven R. Jensen
CHIEF JUSTICE



Supreme Court
STATE OF SOUTH DAKOTA

October 8, 2025

To Our Guests Observing the
October Term Arguments of the
South Dakota Supreme Court

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October Term
of Court.

This booklet has been prepared as part of the continuing
effort of the Supreme Court to promote increased public
knowledge of the South Dakota Unified Judicial System.

We hope it will assist you in understanding some of
the functions of the Supreme Court and make your
observation of the Court hearings a more valuable and
enjoyable experience.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Steven R. Jensen".

Steven R. Jensen Chief Justice

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Wednesday, October 8, 2025

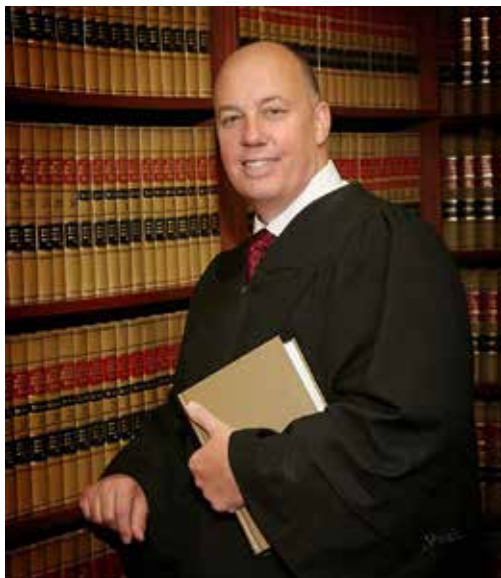
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The Justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to ensure the well-being of all who attend its proceedings, and all attending the morning court sessions will be requested to pass through a metal detector. Backpacks and book bags should not be brought, and other bags and purses are subject to inspection and search by security personnel.



CHIEF JUSTICE STEVEN R. JENSEN

Fourth Supreme Court District

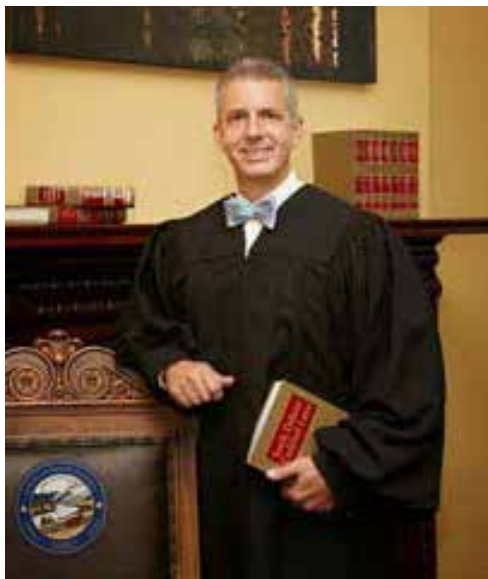
Chief Justice Steven R. Jensen was appointed to the South Dakota Supreme Court by Gov. Dennis Daugaard and sworn in on Nov. 3, 2017. He was selected by his colleagues on the Supreme Court to serve as Chief Justice in 2021. He was reselected to a second, four-year term as Chief Justice beginning Jan. 6, 2025. Chief Justice Jensen grew up on a farm near Wakonda, S.D. He received his undergraduate degree from Bethel University in St. Paul, Minn., in 1985 and his juris doctor from the University of South Dakota School of Law in 1988. He clerked for Justice Richard W. Sabers on the South Dakota Supreme Court before entering private law practice in 1989. In 2003, Chief Justice Jensen was appointed as a First Judicial Circuit judge by Gov. Mike Rounds. He became presiding judge of the First Judicial Circuit in 2011. Chief Justice Jensen served as chair of the Unified Judicial System's Presiding Judges Council, president of the South Dakota Judges Association, and has served on other boards and commissions. In 2009, Chief Justice Jensen was appointed as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington, D.C.



JUSTICE JANINE M. KERN

First Supreme Court District

Justice Janine M. Kern was appointed to the South Dakota Supreme Court by Gov. Dennis Daugaard and sworn in on Jan. 5, 2015. Justice Kern received a bachelor of science degree from Arizona State University in 1982 and her juris doctor from the University of Minnesota Law School in 1985. Justice Kern worked in the Attorney General's office from 1985 to 1996 serving in a variety of capacities including the appellate division, drug prosecution unit and as director of the litigation division. In 1996, she was appointed a circuit court judge in the Seventh Judicial Circuit and served 18 years on the trial court bench. Justice Kern is a member of the American Law Institute, State Bar Association, Pennington County Bar Association, American Bar Association Fellows and past president of the South Dakota Judges Association. She served on the Council of Juvenile Services from 2004 to 2013, the Federal Advisory Committee on Juvenile Justice from 2004 to 2008, and on numerous other boards and commissions.

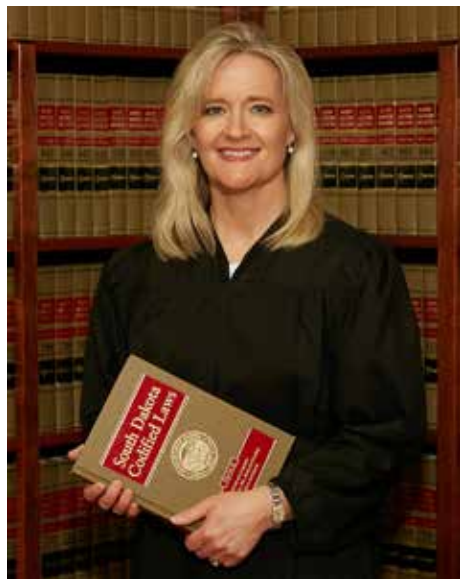


JUSTICE MARK E. SALTER

Second Supreme Court District

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Justice Mark E. Salter was appointed to the South Dakota Supreme Court by Gov. Dennis Daugaard and sworn in on July 9, 2018. Justice Salter received a bachelor of science degree from South Dakota State University in 1990 and his juris doctor from the University of South Dakota School of Law in 1993. After clerking for a Minnesota state district court, he served on active duty in the United States Navy until 1997 and later served in the United States Naval Reserve. Justice Salter practiced law with the Sioux Falls firm of Cutler & Donahoe, where he became a partner before leaving in 2004 to return to public service with the United States Attorney's Office for the District of South Dakota. As an assistant United States attorney, Justice Salter focused on appellate practice and became the chief of the office's appellate division in 2009. He was appointed as a circuit court judge by Gov. Dennis Daugaard and served in the Second Judicial Circuit from 2013 until his appointment to the Supreme Court. He served as the presiding judge of the Minnehaha County Veterans Court from its inception in 2016 until 2018. Justice Salter serves as an adjunct professor at the University of South Dakota School of Law, where he has taught Advanced Criminal Procedure and continues to teach Advanced Appellate Advocacy.



JUSTICE PATRICIA J. DEVANEY

Third Supreme Court District

Justice Patricia J. DeVaney was appointed to the South Dakota Supreme Court by Gov. Kristi Noem and sworn in on May 23, 2019. Justice DeVaney was born and raised in Hand County and graduated from Polo High School in 1986. She received her bachelor of science degree in political science from the University of South Dakota in 1990 and her juris doctor from the University of Virginia School of Law in 1993. Justice DeVaney began her career of public service as an assistant attorney general in the South Dakota Office of Attorney General, where she practiced law from 1993 to 2012. She began her practice in the appellate division, then moved to the litigation division where she spent 17 years as a trial lawyer, prosecuting major felony offenses as well as representing the state in civil litigation in both state and federal trial and appellate courts. She also handled administrative matters for state agencies and professional licensing boards. Justice DeVaney was appointed by Gov. Dennis Daugaard as a circuit court judge for the Sixth Judicial Circuit in 2012. She served as the second judge for the Sixth Circuit Drug & DUI Court. Justice DeVaney has served as the secretary-treasurer and president of the South Dakota Judges Association. She has co-chaired the Supreme Court's Commission on Sexual Harassment in the Legal Profession and serves as vice-chair of the Courthouse Security Committee.



JUSTICE SCOTT P. MYREN

Fifth Supreme Court District

Justice Scott P. Myren was appointed to the South Dakota Supreme Court by Gov. Kristi Noem and sworn in on Jan. 5, 2021. Justice Myren grew up on his family farm in rural Campbell County and graduated from Mobridge High School in 1982. He received a bachelor of science degree, double majoring in history and political science from the University of South Dakota in 1985. He earned his juris doctor from Rutgers University in 1988. Justice Myren practiced law in Denver before returning to South Dakota to work as a staff attorney for the South Dakota Supreme Court. He served as an administrative law judge for the Office of Administrative Hearings and magistrate judge for the Sixth Judicial Circuit. In 2003, he was appointed as a circuit court judge for the Fifth Judicial Circuit by Gov. Mike Rounds. He was re-elected to that position by the voters in 2006 and 2014. He served as judge for the Brown County Drug and DUI Court. He was appointed presiding judge for the Fifth Judicial Circuit in 2014. Justice Myren served as chair of the UJS Presiding Judges' Council and president of the SD Judges' Association. He served on numerous committees, including the Court Improvement Program and Juvenile Detention Alternative Initiative, which he chaired. He was selected as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington, D.C., in 2009.

CLERK OF THE SUPREME COURT



Shirley Jameson-Fergel is the clerk of the Supreme Court. This office assists the Supreme Court, and especially the Chief Justice, in the organization of correspondence, exhibits and other documentation related to formal activities of the Court. This includes monitoring the progress of appeals; scheduling oral arguments before the Court; recording Court decisions, orders and directives; and controlling their release and distribution. The office is also

responsible for management of all legal records of the Court, compiling appellate statistics, and documenting and disseminating Court rules.

SUPREME COURT LAW CLERKS

Law clerks are employed by the Court to assist the Justices with research and writing opinions on the cases under consideration.



L-R: Brock Brown, Supreme Court law clerk; Will West, law clerk for Justice Myren; Caleb Vukovich, law clerk for Justice Salter; Taylor Graves, law clerk for Chief Justice Jensen; Brooklyn Bollweg, law clerk for Justice Kern; Pat Archer, law clerk for Justice DeVaney; Dana Van Beek Palmer, Supreme Court law clerk

SOUTH DAKOTA COURTS

The South Dakota Unified Judicial System consists of the Supreme Court, circuit courts and State Court Administrator's Office. The Supreme Court is the state's highest court and final decision maker on South Dakota law. The circuit courts are the state's trial courts where criminal proceedings and civil litigation are handled. The State Court Administrator's Office provides centralized administrative assistance and support services for the South Dakota judiciary.



SUPREME COURT

The South Dakota Supreme Court is the state's highest court and the court of last resort for state appellate actions.

The Supreme Court is comprised of the Chief Justice, who is the administrative head of the Unified Judicial System, and four justices who are the final judicial authority on all matters involving the legal and judicial system of South Dakota.

Supreme Court justices are appointed by the Governor from a list of nominees selected by the South Dakota Judicial Qualifications Commission. One justice is selected from each of five geographic appointment districts. Permanent justices must be voting residents of the district from which they are appointed at the time they take office. Justices face a nonpolitical retention election three years after appointment and every eight years after that.

The Supreme Court:

- Holds court terms throughout the calendar year.
- Has appellate jurisdiction over circuit court decisions.
- Has original jurisdiction in cases involving interests of the state.
- Issues original and remedial writs.
- Has rule-making power over lower court practice and procedure and has administrative control over the Unified Judicial System.
- Renders advisory opinions to the Governor, at their request, on issues involving executive power.



CIRCUIT COURTS

Circuit courts are the state's trial courts of general jurisdiction through which the bulk of criminal proceedings and civil litigation are processed.

South Dakota has seven judicial circuits, 46 circuit judges and 17 magistrate judges. Circuit court services are available in each county seat.

Circuit court judges are elected by the voters within the circuit where they serve. The judges must be voting residents of their circuit at the time they take office. In the event of a vacancy, the Governor appoints a replacement from a list of nominees selected by the Judicial Qualifications Commission.

- Circuit courts are trial courts of original jurisdiction in all civil and criminal actions.
- Circuit courts have exclusive jurisdiction in felony trials and arraignments and civil actions involving damages of more than \$12,000.
- Jurisdiction of less serious civil and criminal matters is shared with magistrate courts, over which the circuit courts have appellate review.



SUPREME COURT

SUPREME COURT PROCESS

The judicial system of South Dakota has two levels. The circuit courts are the lower courts through which criminal prosecutions and most civil lawsuits are processed. The South Dakota Supreme Court is the state's highest court and the court of last resort for parties who seek to change adverse decisions of the circuit court. The Supreme Court is the final judicial authority on all matters involving the legal and judicial system of South Dakota.



Appellate Jurisdiction

When an individual involved in a legal action is convinced that the judge in the circuit court has made an error in deciding the law of the case, that party may bring the case to the Supreme Court for a remedy. This is called an “**appeal**,” and the court hearing the appeal is called the “**appellate**” court. The party bringing the appeal is an “**appellant**” and the other party—usually the party who was successful in the lower court—is the “**appellee**.” Most of the work of the Supreme Court involves its appellate jurisdiction.

- In an appellate action, the Court may decide to hear “oral arguments” in the case, in which both parties are permitted to come before the Court and give a short presentation (an argument) to support their position in the case.

SUPREME COURT

- There is no trial, the lawyers do not confront each other, and the Court does not take testimony from witnesses.
- Usually, the attorneys for the parties involved stand before the Court and speak for 15 minutes to emphasize or clarify the main points of the appeal.
- The members of the Court may ask questions or make comments during the lawyer's presentation.
- After hearing oral arguments, the Court discusses the case, and one justice is assigned to write the opinion in the case.
- Other justices may write concurring or dissenting opinions to accompany the majority opinion, all of which are published as formal documents by the West Publishing Company in the North Western Reporter. Opinions are also available online at: <https://ujs.sd.gov>.



Original Jurisdiction

In addition to its appellate jurisdiction, the Supreme Court has its own area of “**original**” jurisdiction. It is also responsible for a wide range of administrative duties involving the personnel and procedures of the court system and the professional conduct of attorneys throughout the state.



Justices

The five members of the Supreme Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business.

It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench to assist in the decision-making process. Such an appointment may occur when a justice is disqualified. A justice may be disqualified when the justice appears to have a conflict or personal



involvement in a case, or if there is a vacancy on the Court caused by the illness or departure of a justice.

Those who sit on the Supreme Court must be licensed to practice law in the state, and permanent justices must be voting residents of the district from which they are appointed at the time they take office. There is no formal age requirement for those who serve on the Court, but there is a statutory requirement that a justice must retire shortly after reaching the age of 70. A retired justice, if available, may be called back to temporary judicial service in any of the state's courts.

Under the terms of a constitutional amendment passed by the voters in 1980, vacancies on the Supreme Court are filled by the Governor's appointment. This appointment must be made from a list of two or more candidates recommended by the Judicial Qualifications Commission. All Supreme Court justices must stand, unopposed, for statewide approval or rejection by the electorate in a retention election. For newly-appointed justices, the retention vote is held at the next general election following the third year after appointment. After the first election, justices stand for retention election every eighth year.

SUPREME COURT DISTRICT MAP



- **Chief Justice Steven R. Jensen**
Appointed to the Supreme Court in 2017 from district four.
- **Justice Janine M. Kern**
Appointed to the Supreme Court in 2014 from district one.
- **Justice Mark E. Salter**
Appointed to the Supreme Court in 2018 from district two.
- **Justice Patricia J. DeVaney**
Appointed to the Supreme Court in 2019 from district three.
- **Justice Scott P. Myren**
Appointed to the Supreme Court in 2021 from district five.

Our Mission

The Unified Judicial System (UJS) is dedicated to providing a fair, impartial, and accessible court system that upholds the rule of law and is worthy of the public's trust and confidence.

Our Vision

Justice for All.

COURTROOM PROTOCOL

The following list of do's and do not's was prepared for the benefit of anyone attending one of the Supreme Court's sessions. Your cooperation in observing proper courtroom protocol will assure that the lawyers presenting argument before the Court will not be unduly distracted and that the proper respect for the judiciary will be maintained. Your cooperation is appreciated.



DO

- Remove caps/hats before entering the courtroom.
- Enter the courtroom prior to the commencement of an argument.
- Stand when the justices enter and leave the courtroom.
- Listen attentively.
- Turn cell phones off before entering the courtroom.



DO NOT

- Bring food, drinks, cameras, or recording equipment into the courtroom.
- Enter or leave the courtroom during the course of an argument.
- Chew gum or create any distraction.
- Engage in any conversation once an argument begins.

TERM OF COURT CASE SUMMARIES

Eight cases are scheduled for oral argument during the Supreme Court's October 2025 Term of Court. For these cases, attorneys are permitted to appear before the Court to emphasize certain points of the case and respond to the Court's questions.

In addition to these oral arguments, numerous other cases will be considered by the Court during this term without further argument by the attorneys. These cases are on the Court's "non-oral" calendar.

The case summaries on the following pages have been prepared only for the cases scheduled for oral argument. The case number, date and order of argument appear at the top of each summary.

CASES

Case #30899

Wednesday, October 8, 2025—Number 1

Morse, et al v. State, et al

A nearly 30-foot-deep sinkhole opened in the Hideaway Hills residential community located in Black Hawk, South Dakota, on April 27, 2020, leading to the class action at issue. The sinkhole appeared in a resident's front yard, consuming much of the yard and adjacent residential street and exposing a large underground void. Soon after the sinkhole opened, it became apparent to the residents of Hideaway Hills that the community was built atop an old, underground gypsum mine, which was the cause of the surface and subsurface instability. Thirteen homes were evacuated due to the instability, and around 150 residents experienced and are currently experiencing issues such as cracking and settling. Andrew Morse, and the affected residents of the Hideaway Hills community, filed suit against the State of South Dakota among other parties seeking compensatory and consequential damages.

A brief history of the ownership and mining activity on the land is relevant to provide context for Plaintiff's claims. The first recorded mining of the land was in the early 1900s by Dakota Plaster. Dakota Plaster used the "room and pillar" method, which resulted in a substantial network of underground tunnels and large, cavernous rooms. Dakota Plaster mined the site for almost 30 years until they sold the mine to US Gypsum in 1930.

Edwin Stensaas purchased the property from US Gypsum in 1945 and resided in a ranch house with his family on the northwest corner of the property from 1945 until the late 1980s. Stensaas worked for Hills Material, a subsidiary of Northwestern Engineering, which mined the property from 1946 until the mid-1950s. The record reflects that the next recorded mining activity began when the South Dakota Cement Plant, a subdivision of the State, purchased the property in 1985 from Stensaas by contract for deed. Stensaas preserved a life estate in the property so that he could continue to reside in his home and on a portion of nearby land.

CASES

The Cement Plant continued mining gypsum on the property throughout the 1980s and into the 1990s. But, unlike Dakota Plaster, the State contends that it did not perform underground mining, instead relying on surface mining to extract gypsum. Surface mining consists of digging large open-air pits to extract the exposed minerals. The parties dispute the extent and location of the mining activities on the property. Morse maintains that the State conducted blasting in the underground tunnels previously mined by Dakota Plaster looking for additional deposits of gypsum.

As required by statute, the State began reclaiming the land as it continued to mine, ultimately reclaiming around 16 acres. This involved adding fill materials, regrading, and revegetating the surface mine to its prior use, which was pastureland. The State, when reclaiming the surface mines, used backfill from locally available materials, including pulverized gypsum. Morse maintains that the State improperly reclaimed the land it mined, leading to the settlement and structural issues that Plaintiffs claim caused their damages.

After the property was reclaimed, the State listed it for sale. The State, as required by statute, had the land appraised for its “highest and best use,” which the appraiser determined was for a “residential ranchette.” The appraiser noted that the lack of utilities foreclosed the possibility of other types of developments.

The State sold the property to Raymond Fuss in 1994, while reserving its subsurface mineral rights to the land. Fuss later gifted the property to his son, Larry. The parties engaged in discovery which revealed that Fuss was aware that the Cement Plant had previously engaged in surface mining on the property, and he had knowledge of an existing underground mine. The deed from the State to Fuss did not contain restrictions on future development. Larry moved into Stensaa's house on the northwest corner in 1998. He cut hay on the land and leased it to pasture horses until approximately 2000.

Byron Keith Kuchenbecker, a local developer, approached Larry in 2000 regarding a proposal to develop the pastureland into a residential community. Larry accepted. It was revealed through discovery that Larry knew multiple companies had developed

CASES

underground mines on the property, but he did not know the location and extent of the mining that had occurred. When Larry sold Kuchenbecker his surface rights, the purchase agreement contained a disclaimer noting that Kuchenbecker accepts the land “as is” with no guaranty that the property was “suitable for any development contemplated” by Kuchenbecker. The disclaimer specifically outlined and disclosed the presence of potential “underground cavities.”

Kuchenbecker began development of Hideaway Hills, a planned residential subdivision, in 2002 by first leveling portions of the property and removing surface vegetation and topsoil by scraping. He became aware of significant issues with the subsurface of the land when he and his developers ran into several large underground voids during development, both while scraping the land and while digging utility trenches. Once development concluded in 2005, Kuchenbecker contracted with realtor Ronald Sjodin to sell the lots in Hideaway Hills to individual homebuilders.

The purchase agreement from Kuchenbecker to each homebuilder contained a provision disclosing the presence of inactive underground mines and disclaiming any warranty related to subsurface conditions. Realtor Sjodin also represented each homebuilder on the subsequent sale to each of the homebuyers, but he did not provide the homebuyers with a disclaimer related to prior mining activity below ground similar to those in the contracts between Kuchenbecker and the homebuilders. The purchase agreements between the homebuilders and homebuyers did not contain any reference to mining or underground activity. The homebuyers remained largely unaware of the existence of underground mines in the area.

The Hideaway Hills Subdivision was completed around 2005, and residents began moving in shortly thereafter. The record reveals homebuyers began reporting signs of settlement and cracking within their homes in 2008. The sinkhole that triggered the present cause of action formed on April 27, 2020, forcing some residents to evacuate their homes. The nearly 30-foot-deep sinkhole opened mere feet from the edge of a resident’s home, exposing pipes and underground lines that crossed beneath the subdivision. Resident Andrew

CASES

Morse brought a class action lawsuit against the State on behalf of himself and other Hideaway Hills residents affected by the unstable subsurface conditions alleging inverse condemnation, breach of duty of subsurface/subjacent support, and unjust enrichment. Morse later dismissed all claims except for the inverse condemnation claim, arguing that the State “took or damaged his property for public use without just compensation,” not as an exercise of a valid police power, in violation of Article VI § 13 of the South Dakota Constitution. In Morse’s view, the “failure to provide adequate subsurface support is a taking” under the state Constitution and strict liability therefore applies, particularly for land in its natural condition.

The parties filed cross motions for summary judgment. The circuit court granted summary judgment to the State and dismissed the matter with prejudice. The court reasoned that Morse’s claims sounded in tort, in that the case was primarily a tort action for subjacent support rather than a claim for inverse condemnation. As such, the court determined that Morse was precluded from pursuing a tort claim against the State because the State, as a sovereign entity, is immune from suit. Alternatively, the State asserts there are multiple additional reasons to affirm the grant of summary judgment, including the fact that the Cement Plant’s mining was not a public use, Kuchenbecker’s and Sjodin’s actions were intervening causes, and Plaintiffs’ claim is barred by the statute of repose.

Morse appeals, raising two issues:

1. Whether the circuit court erred in granting summary judgment to the State based on sovereign immunity.
2. Whether Plaintiffs can demonstrate a viable inverse condemnation claim.

Ms. Kathleen R. Barrow, Mr. Matthew Nis Leerberg, Mr. Michael S. Beardsley, and Mr. Matthew J. McIntosh, Attorneys for Appellants Morse et al.

Mr. Justin Bell, Mr. Robert B. Anderson, Ms. Terra M. Larson, and Mr. Robert Morris, Attorneys for Appellee State of South Dakota

CASES

Case #30804

Wednesday, October 8, 2025—Number 2

State v. Richter

On July 3, 2021, Larry Richter hosted a Fourth of July party at his home, and several guests were in attendance. One of the people at Richter's party was D.W. Because of an intellectual disability, D.W. functions at a seven-year-old level.

As the party was going on, D.W. asked Richter if he could ride one of Richter's four-wheelers. Richter agreed and let D.W. drive while he sat behind D.W. They left Richter's property and drove to a nearby field. D.W. reported that while he was driving, Richter placed one hand on D.W.'s genitals. D.W. asked Richter why he had his hand there and asked him to stop, but Richter refused. D.W. also described another incident that occurred later that evening. He explained that he and Richter were sitting on Richter's covered hot tub and that Richter placed his hand on D.W.'s genitals and refused to move it. The final incident that D.W. described occurred in Richter's backyard. D.W. said that Richter told him to meet him behind Richter's trailers. He explained that while behind the trailer, Richter placed his hand down his pants to D.W.'s genitals.

After D.W. reported these incidents, his mother began contacting Richter about the allegations. She recorded a phone call with Richter, where he admitted to the incidents described by D.W. D.W.'s mother shared the recorded phone call with law enforcement. D.W. was referred to a child advocacy clinic, where Dr. Nancy Free evaluated him. Richter was charged with three counts of sexual contact with a person incapable of consenting.

At trial, D.W. wanted to testify with a stuffed animal—a monkey named "Ish." Richter opposed this and filed a motion requesting that the circuit court not allow D.W. to do so. The circuit court allowed D.W. to hold the stuffed animal. During the State's case-in-chief, it called Dr. Free. In part of her testimony, Dr. Free explained that intellectually disabled individuals are at an increased vulnerability to sexual abuse. After the State finished presenting evidence, Richter made a motion requesting that he be acquitted because he believed

CASES

the State did not introduce sufficient evidence for the jury to convict him. The circuit court denied Richter's motion. Richter testified during his case-in-chief. He explained that he lied during the phone call that D.W.'s mother recorded so she would stop bothering him about the allegations. On cross-examination, the State questioned Richter about the inconsistency between his statements during the phone call and his trial testimony. The jury convicted Richter on all counts.

Richter appeals to this Court, raising the following issues:

1. Whether the circuit court erred when it allowed D.W. to hold a stuffed animal while testifying.
2. Whether the circuit court erred in denying his motion for an acquittal.
3. Whether the circuit court erred when it received a portion of Dr. Free's testimony.
4. Whether the circuit court erred when it allowed the State to ask certain questions during its cross-examination of Richter.

Ms. Nicole J. Laughlin, Attorney for Appellant Larry Richter

Mr. Marty J. Jackley, Attorney General, and Ms. Angela R. Shute,
Assistant Attorney General, Attorneys for Appellee State of South
Dakota

CASES

Case #30857, #30872

Wednesday, October 8, 2025—Number 3

Estate of Sanborn v. Peterson, et al.

On November 24, 2019, Kylee Sanborn and her older sister Jayna were killed when their car collided head on with another vehicle on U.S. Highway 281 near Alpena. Kylee was driving; Jayna was a passenger; and the pair were heading north. As they approached a slight bend in the highway, the Sanborn car drifted to the right over the fog line. The car's passenger-side wheels dropped five to six inches from the highway surface to the shoulder. In an effort to direct the car back onto the highway, Kylee steered the car to the left, resulting in an overcorrection as all four wheels came back on to the pavement. The overcorrection placed the Sanborn girls' car in the southbound lane where it collided with a pickup.

Sarah Sanborn, Kylee and Jayna's mother, acting on behalf of the estate of each daughter (collectively, the Sanborns), brought a lawsuit which named as defendants five South Dakota Department of Transportation (DOT) employees in both their official and individual capacities. The Sanborns' complaint alleged that the employees breached both statutory and common law duties to maintain and repair the gravel shoulder along Highway 281 so that it was flush with the roadway.

The DOT employees moved for summary judgment under two distinct theories. First, they claimed that they could not be sued on the basis of sovereign immunity, which is a legal doctrine that prohibits civil actions against the state or its employees when they are performing a discretionary function. Second, the DOT employees argued that they owed only a general duty to the traveling public at large, not a specific duty of care to individual motorists. This claim is based on a legal rule known as the public duty doctrine, which—where it applies—prohibits actions against governmental entities that are performing public functions such as law enforcement or furthering public safety.

CASES

The circuit court determined that the defendants were entitled to sovereign immunity in their official but not individual capacities. The court found that a DOT policy relating to gravel shoulder maintenance created a ministerial, non-discretionary, duty to maintain Highway 281's shoulder so that it was flush with the roadway. The court did, however, grant summary judgment in the employees' favor after concluding that the public duty doctrine barred the Sanborns' individual-capacity claims.

The Sanborns appealed the circuit court's adverse decision on the public duty doctrine, and the DOT employees have sought review of the circuit court's sovereign immunity ruling. Consolidated, the parties raise the following issues:

1. Whether the DOT employees are entitled to sovereign immunity in their individual capacities.
2. Whether the circuit court erred when it concluded that the public duty doctrine bars the Sanborns' claims.

Mr. Michael J. Schaffer, Mr. Paul H. Linde, and Mr. John W. Burke,
Attorneys for Appellants the Estate of Kylee Sanborn and the Estate
of Jayna Sanborn

Mr. Justin L. Bell and Mr. Douglas A. Abraham, Attorneys for Appellees
Mark Peterson, Todd Hertel, Brad Letcher, Dan Martel, Michael Hieb,
and Terence Peck

CASES

Case #30787, #30788

Wednesday, October 8, 2025—Number 4

State v. Spry

Richard Hermanek was born and raised in Bon Homme County, South Dakota. He worked for many years for the Bon Homme County Highway Department and built a home in Running Water. Hermanek never married but had many relatives in the area including nieces, nephews, and his sister, Milada. In 2012, at age 82, Hermanek suffered a stroke that left him with aphasia, garbled speech, and difficulty communicating with others. He left his home in Running Water and moved in with Milada, who was living in a home owned by her son, Richard Spry, and his wife, Susan. The Sprys and their sons, particularly Brenton, regularly spent time with Hermanek and Milada, traveling from their home in Omaha, Nebraska, and later from Texas after they relocated, back to South Dakota for visits, holidays, and time at Hermanek's former home in Running Water. During these years, Hermanek was able to drive and managed his own finances.

Milada broke her hip in 2018 and was placed in the nursing home in Tyndall. She had at some point executed a power of attorney (POA) naming her son Richard and daughter-in-law Susan as her attorneys in fact. Unable to manage without her, Hermanek then moved into an assisted living facility near the nursing home. On July 25, 2018, he met with attorney Lisa Rothschadel and also executed a POA naming Richard and Susan as his attorneys in fact. Hermanek moved into the nursing home in August 2018 and eventually obtained a private room. Acting under the POA, the Sprys managed Hermanek's finances and property, paid his bills and nursing home expenses, and prepared his Running Water home for sale. They used sale proceeds and existing bank funds for his expenses, reimbursed their travel to South Dakota connected to his care, and compensated themselves for work performed while preparing his house for sale. Susan also collected a monthly POA maintenance fee. After Hermanek's death, both Richard and Susan were indicted by a Bon Homme grand jury for their handling of his affairs and convicted of several offenses after a jury trial.

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The evidence at their joint jury trial, held in April 2024, revealed that Richard was assessed shortly after he was admitted to the nursing home. LPN and social worker Julie Rothschadl described Hermanek as a cooperative and pleasant man who was confused. After Hermanek made multiple attempts to leave the facility, a wander-guard bracelet was placed on his arm to alert staff if he attempted to leave the building. Cognitive testing between August and December 2018 reflected significant cognitive decline over time. In September 2018, Susan told staff she felt Hermanek was vulnerable and could be talked into anything. She asked that he not be allowed to leave with anyone other than a family member.

Frustrated with Hermanek's existing bank account at Security State Bank in Tyndall because of the lack of privacy and convenience, the Sprys decided to open a joint account at Mutual of Omaha Bank in Nebraska in the names of Hermanek, Susan, and Richard. Susan testified she discussed the plan with Hermanek twice, he "seemed fine with it," she expected him to live a couple more years, and that she did not anticipate any money would remain after paying for his care.

To get the account paperwork signed, the Sprys sent their employee, Loveda Way, and their son, Brenton, to the nursing home on October 17, 2018. Nurse Nikki Chladek testified that Hermanek was suffering from an infection that day, was confused, and did not recognize Way or Brenton when they arrived in his room. In contrast, Brenton testified Hermanek did recognize them. Way testified that she explained to Hermanek that he, Susan, and Richard would have access to the account to pay expenses and that any remaining funds at death would pass to the Sprys. Way testified that Hermanek nodded, eagerly reached for the pen, and signed. At trial, the court excluded as hearsay Way's account that Hermanek said "Mmm-hmm" and "Susie, yes" while she explained the joint account agreement.

Although Susan, Way, and Brenton testified that survivorship was discussed, the survivorship selection on the joint account agreement was left blank, and the circuit court concluded the document itself did not reflect an intent by Hermanek to elect survivorship. The proceeds from the sale of Hermanek's home—\$97,872.07—were later placed in this Mutual of Omaha account, along with \$75,000 from the

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Security State Bank account and a \$673.10 reimbursement from the nursing home for an overcharge. Five days after Hermanek's passing, Susan wrote a check from the Mutual of Omaha account for \$170,000 and deposited it in the Sprys' personal Beacon Federal Credit Union account.

Other witness testimony on Hermanek's capacity varied. Multiple friends described his difficulties with communication after his stroke but noted no obvious cognitive impairment. In contrast, Hermanek's nieces recounted episodes where Hermanek misidentified relatives or failed to recognize family. They also described watching him struggle to purchase a slice of pizza in town during the time he was living with Milada.

Hermanek died intestate on March 14, 2019. The remaining Mutual of Omaha Bank account balance passed to the Sprys by right of survivorship. They transferred the money to their bank in Texas and closed the account. Concerned relatives, who would have inherited from Hermanek, filed a civil suit in federal court against the Sprys. Law enforcement was notified, and an investigation ensued. The Sprys were eventually indicted by a Bon Homme County grand jury on one count of grand theft and one count of conspiracy based on the alleged unauthorized use and control of the Mutual of Omaha funds. Susan was also indicted on three counts of grand theft by exploitation relating to the transfer of two cars and certain claimed reimbursements. She was also indicted for theft by exploitation for taking the POA maintenance fee after Hermanek's death. Richard was also charged with one count of grand theft for depositing Hermanek's 2018 tax refund, which he received after Hermanek's death.

At trial in April 2024, the Sprys requested an instruction on testamentary capacity, arguing that the joint account with rights of survivorship was intended to be testamentary in nature considering the testimony regarding Hermanek's intent. The State proposed a contractual capacity instruction, arguing the joint account agreement was a contract. The court treated the Mutual of Omaha agreement as a contract and instructed the jury that contractual capacity was required to find the contract valid, rejecting the Sprys' proposed instruction on testamentary capacity.

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The court also instructed the jury that the ordinary presumption that a joint account carries survivorship rights could be rebutted by clear and convincing evidence of contrary intent. The same instruction apprised jurors they could not convict of any charge unless the State proved every element—including unauthorized control of Hermanek’s funds, which turns on whether the survivorship presumption is rebutted—beyond a reasonable doubt.

Both Susan and Richard were convicted of grand theft and conspiracy. Richard was further convicted on the tax return grand theft count, and Susan was convicted of exploitation based on the maintenance fee but acquitted on the car transfers and reimbursement-related grand theft by exploitation counts. The court sentenced Susan and Richard to probationary terms which included restitution. This appeal concerns only the grand theft and conspiracy convictions tied to the Mutual of Omaha joint account.

On appeal, the Sprys raise three issues:

1. Whether the circuit court erred in refusing Defendants’ proposed instruction on testamentary capacity.
2. Whether the court erred in excluding testimony about Hermanek’s contemporaneous out-of-court statements (“Mmm-hmm;” “Susie, yes”) during the account signing.
3. Whether the court erred by instructing the jury that the survivorship presumption could be rebutted by clear and convincing evidence while reiterating that the State bore the beyond a reasonable doubt burden on all elements of the charged offenses.

Mr. Marty J. Jackley, Attorney General, and Ms. Renee Stellagher, Assistant Attorney General, Attorneys for Appellee State of South Dakota

Mr. John R. Hinrichs, Attorney for Appellants Richard and Susan Spry

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Case #30947

Thursday, October 9, 2025—Number 1

City of Sioux Falls v. Johnson Properties, LLC

In 2005, the City of Sioux Falls (City) undertook a construction project to expand Arrowhead Parkway on the east side of the city. In 2011, it began Phase 2A of the project, which involved the realignment of the intersection of Arrowhead Parkway and Six Mile Road. Specifically, the City planned to relocate the existing intersection to the west; add turning lanes, medians, and stoplights, and reorient the sharp angle created by the intersection, which presented a safety hazard.

The land situated at the corner of Arrowhead Parkway and Six Mile Road was owned by Johnson Properties and housed the Alibi Bar & Grill. To complete Phase 2A, the City needed to acquire two pieces of land located at that corner. In 2021, the City, through its eminent domain authority, filed a petition for condemnation and declaration of taking to acquire the two pieces of property and a temporary easement to perform work on the project.

The parties were unable to agree on an amount of just compensation for the taking, and, after the City's final offer of \$250,000 was rejected, they proceeded to trial. At the end of trial, the jury returned a verdict awarding Johnson Properties just compensation in the amount of \$382,600. Johnson Properties subsequently filed a motion for attorney fees pursuant to SDCL 21-35-23, which requires the court to allow "reasonable attorney fees" in a condemnation proceeding if the final judgment awarded to a defendant exceeds \$700 and is 20% greater than the plaintiff's final offer.

Johnson Properties requested \$139,724.60 in attorney fees and argued that such an amount was reasonable under the applicable Kelley factors: (1) the time and labor required; (2) the fee customarily charged for similar legal services; (3) the amount involved and the results obtained; (4) the experience, reputation, and ability of the lawyer; and (5) whether the fee is fixed or contingent. Alternatively, the City argued that all attorney fee calculations under the statute must start with the lodestar figure—the number of hours expended

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by counsel multiplied by their hourly rate—before a consideration of the Kelley factors. The City asserted that the lodestar figure of \$61,740 was a reasonable amount of attorney fees and that the Kelley factors did not support the court deviating upward from that amount. The circuit court ultimately entered an order awarding Johnson Properties \$139,724.60 in attorney fees.

The City raises one issue on appeal:

1. Whether the circuit court abused its discretion in awarding Johnson Properties \$139,724.60 in attorney fees.

Mr. James E. Moore and Mr. Drew A. Driesen, Attorneys for Appellant
City of Sioux Falls

Mr. Clint Sargent and Ms. Erin E. Willadsen, Attorneys for Appellee
Johnson Properties, LLC

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Case #30891

Thursday, October 9, 2025—Number 2

LJP Consulting LLC v. Vervent, Inc.

Plaintiff, LJP Consulting LLC, entered into a Referral Agreement with Total Card, Inc. (TCI). Under the Referral Agreement, LJP was to identify and refer credit card businesses to TCI for which TCI would provide account servicing, including customer service and call center operations. In 2014, LJP referred First Equity Credit Card Corp. to TCI, and First Equity and TCI entered into a Servicing Agreement. For that referral to TCI and pursuant to the Referral Agreement, TCI paid LJP 3% of the fees that TCI received from First Equity. From 2014 to 2020, TCI generated approximately \$41,000,000 in fees for servicing the First Equity accounts, and in turn, TCI paid referral fees to LJP for the First Equity accounts, totaling approximately \$1,230,000.

In late 2020, most of TCI's assets and liabilities, including those related to the Referral Agreement, were acquired by Defendant, Vervent, Inc. Vervent continued to provide the services that TCI had provided to First Equity and also paid LJP the 3% referral fee for the accounts serviced in November and December 2020. However, in January 2021, Vervent notified LJP that it was terminating the Referral Agreement and refused to pay the referral fees going forward.

LJP brought suit against Vervent in April 2021, seeking a declaratory judgment that the Referral Agreement was a valid and enforceable agreement and that LJP was entitled to its 3% referral fee for so long as the First Equity accounts continue to generate revenue. LJP sought damages for Vervent's past breach of the Referral Agreement and sought specific performance of the Referral Agreement going forward. Vervent moved to dismiss the lawsuit, arguing that there was no contract between LJP and Vervent because, under a general rule of contract interpretation, the Referral Agreement, which has no specified term as to its duration, is terminable at will.

LJP claimed that while this general rule allows Vervent to terminate the Referral Agreement as to prospective referrals, an exception to the terminable-at-will rule applies here, namely, that one cannot unilaterally terminate an ongoing obligation to pay the agreed upon fee associated with a completed referral. The circuit court agreed

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with LJP on this issue and denied Vervent's motion to dismiss. The circuit court later held, as a matter of law, that Vervent acquired all assets and obligations of TCI relating to TCI's Referral Agreement with LJP and TCI's Servicing Agreement with First Equity. The court also held, as a matter of law, that Vervent was liable to pay some amount to LJP pursuant to the Referral Agreement, but the court determined that there is a disputed issue of fact regarding the amount LJP owes.

While the lawsuit was pending, First Equity was acquired in March 2022 by Phoenix Card Group LLC (Phoenix), a corporation affiliated with Vervent. LJP filed a motion in limine to exclude any evidence of this acquisition at trial, but Vervent asserted that such evidence was relevant to the issue of damages. Vervent claimed that after this acquisition of First Equity, it no longer owed referral fees to LJP for the intracompany servicing it was thereafter providing on the First Equity accounts. In response, LJP noted that while Phoenix is affiliated with Vervent, it is a separate corporation, and after it acquired First Equity, Vervent has continued to service the First Equity accounts and continues to generate monthly invoices for the related fees. LJP argued that so long as Vervent continues generating revenue for servicing the First Equity accounts, it is obligated to continue paying the referral fee to LJP. The court granted LJP's pretrial motion and excluded evidence of the First Equity acquisition.

A jury trial was held on the issue of damages. After the close of LJP's case-in-chief, the court reversed its pretrial ruling and allowed Vervent to introduce evidence, in its case-in-chief, of the acquisition of First Equity and the contract under which Vervent has since been servicing the First Equity accounts. At the conclusion of the trial, the jury determined that Vervent continued to be liable for damages after the acquisition of First Equity and computed damages for each month that Vervent refused to pay LJP its referral fee. The jury awarded LJP a total of \$1,000,064.75 in damages for referral fees owed from January 2021 through June 2024. The circuit court denied Vervent's post-trial renewed motion for judgment as a matter of law on the issue of whether damages could be awarded after the March 2022 acquisition of First Equity. The circuit court also awarded LJP specific performance and a permanent injunction, mandating Vervent's payment of future referral fees to LJP under the Referral Agreement for so long as Vervent is servicing any active First Equity accounts.

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Vervent appeals, raising the following issues:

1. Whether the Referral Agreement is terminable at will with respect to past referrals.
2. Whether Vervent's acquisition of First Equity terminated Vervent's obligations under the Referral Agreement.
3. Whether the circuit court abused its discretion in awarding LJP prospective monetary relief through a permanent injunction.

Mr. Shawn Nichols and Ms. Claire Wilka for Appellant, Vervent, Inc.

Mr. Tim Shattuck and Ms. Jaquelyn Bouwman for Appellee, LJP Consulting, Inc.

Case #30905

Thursday, October 9 2025—Number 3

State v. Edwards

Donnie Edwards was charged with multiple counts of rape, sexual contact with a child, and incest after his biological daughter and his stepdaughter, as adults, disclosed his sexual abuse that started in their childhood. Prior to trial he filed a motion to sever, alleging that the charges relating to one victim should be tried separately from those relating to the other victim. The circuit court denied the motion, concluding the acts relating to the charges constituted a common plan or scheme, and the case proceeded to a jury trial.

After voir dire was completed and 12 jurors plus two alternates were selected, but before the trial commenced, one of the jurors requested that she be excused from the jury. She revealed that, approximately two years prior, facts had come to light that her granddaughter was a victim of sexual abuse as a young child. Because of this, the juror believed she would find it difficult to serve in this case. The juror

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had not disclosed this information during voir dire. Edwards moved for a mistrial, alleging that a structural error impacting his right to a fair and impartial jury had occurred. After questioning the juror, the court excused her and instead seated one of the alternate jurors in her place and denied Edwards' mistrial motion.

During trial, the prosecutor asked a question, while cross-examining a defense witness, that referenced Edwards' "past." Counsel for Edwards objected and the court recessed to consider the parties' arguments out of the presence of the jury. Edwards moved for a mistrial, which the court denied. Thereafter, the court informed the jury that the question and the witness's answer were struck from the record and the jury was to disregard them.

Edwards raises the following issues on appeal:

1. Whether the circuit court abused its discretion by denying the motion to sever the charges.
2. Whether the circuit court abused its discretion by denying the motion for a mistrial regarding the late disclosure of juror bias.
3. Whether the circuit court abused its discretion by denying the motion for mistrial regarding the prosecutor's question that referred to Edwards' past.

Mr. Timothy R. Whalen, Attorney for Appellant Donnie Edwards

Mr. Marty J. Jackley, Attorney General, and Mr. Paul Swedlund, Solicitor General, Attorneys for Appellee State of South Dakota

CASES

Case #30871

Thursday, October 9, 2025—Number 4

In re the Matter of Estate of Roger J. Cunningham

This case concerns the disposition of the late Roger Cunningham's individual retirement account (IRA). Roger and Sheila Cunningham were married in 1981. The couple spent most of their marriage as residents of Tennessee. In 1996, Roger opened an IRA and designated Sheila as its sole beneficiary.

In 2015, the couple filed for divorce and began negotiating a marital dissolution agreement (MDA). While the divorce proceedings were pending, Roger moved to Sioux Falls. Sheila, however, remained in Tennessee. In the MDA that Roger and Sheila ultimately signed, Sheila agreed to give up any interest in Roger's IRA.

Roger lived in Sioux Falls until his death in March 2024. Following the 2015 divorce, Roger had executed a new will, which appointed his daughter from an earlier relationship, Susan, as the personal representative of his Estate. He did not, however, remove Sheila as the beneficiary to his IRA.

Shortly after Roger's passing, Susan began a probate action for her father's Estate which was intended to collect Roger's assets, satisfy any debts, and distribute his property according to his will. As part of this effort, Susan reached out to the manager of Roger's IRA who advised Susan that Roger had never updated his IRA beneficiary designation following his divorce from Sheila. Based on this original beneficiary designation, the IRA's assets were later transferred to an account in Sheila's name.

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Susan, acting on behalf of the Estate, then filed a motion for declaratory judgment within the pending probate proceeding requesting a declaration that SDCL 29A-2-804—also known as the revocation-upon-divorce statute—applied to automatically revoke the beneficiary designation upon Roger and Sheila’s divorce. The circuit court scheduled a hearing on the Estate’s motion. A notice of the hearing and a copy of the motion were mailed to Sheila at her residence in Tennessee.

Sheila retained South Dakota counsel who filed a motion to dismiss, claiming that the circuit court lacked both personal jurisdiction and jurisdiction over the IRA’s assets. Sheila’s attorney also argued that a motion for declaratory judgment within probate proceedings was procedurally improper and that declaratory relief could only be pursued in a separate action. The circuit court ultimately denied Sheila’s motion to dismiss, granted the Estate’s motion for declaratory judgment, and determined that the IRA’s assets belonged to Roger’s Estate.

Sheila raises the following issues on appeal:

1. Whether the circuit court had jurisdiction to adjudicate Sheila’s interest in the IRA.
2. Whether the circuit court erred by granting a motion for declaratory judgment that was filed within a probate proceeding rather than requiring the Estate to file a separate action.

Ms. Elizabeth S. Hertz, Attorney for Appellant Sheila Cunningham

Mr. Thomas P. Schartz and Mr. Tim R. Shattuck, Attorneys for Appellee Susan Metz, Personal Representative for the Estate of Roger J. Cunningham

GLOSSARY OF TERMS

Affirm

When the Supreme Court “affirms” a circuit court’s action, it declares that the judgment, decree or order must stand as decided by the circuit court.

Appeal

The Supreme Court’s review of a circuit court’s decision in a lawsuit. The Supreme Court does not consider new evidence or listen to witnesses. Rather, it reviews the record of a case and applies the proper law to determine if the circuit court’s decision is correct.

Appellant

The party who takes an appeal from the circuit court to the Supreme Court. (In other words, the party who does not agree with the result reached in circuit court.)

Appellee

The party in a case against whom an appeal is taken; that is, the party who does not want the circuit court’s decision reversed. Sometimes also called the “respondent.”

Brief

A document written by a party’s attorney containing the points of law which the attorney desires to establish, together with the arguments and authorities upon which their legal position is based. The brief tells the Supreme Court the facts of the case, the questions of law involved, the law the attorney believes should be applied by the Court, and the result the attorney believes the Court should reach.

Defendant

The party sued by the plaintiff or prosecuted by the state in the circuit court.

GLOSSARY OF TERMS

Oral Argument

An opportunity for the attorneys to make an oral presentation to the Supreme Court when the appeal is considered. Oral arguments also give the Court an opportunity to ask the attorneys questions about the issues raised in their briefs.

Plaintiff

The party who brings a lawsuit in the circuit court.

Record

All the papers filed in a circuit court case including any transcripts. This includes the original complaint, motions, court orders, and affidavits and exhibits in the case.

Remand

The Supreme Court “remands” an appealed case back to the circuit court for some further action. For example, the Supreme Court might remand a case to the circuit court and require that court to hear additional evidence and make further factual findings that are important in deciding the case.

Reverse

When the Supreme Court “reverses” a circuit court decision, it finds that a legal error was made and requires that the decision be changed.

Transcript

A document that contains a verbatim account of all that was said in a circuit court case by the parties, the attorneys, the circuit judge, and any witnesses. The transcript is prepared by the court reporter, and it is reviewed by the Supreme Court as part of the appeal process.



SOUTH DAKOTA SUPREME COURT JUSTICES

L-R: Justice Patricia J. DeVaney, Justice Janine M. Kern, Chief Justice Steven R. Jensen, Justice Mark E. Salter, and Justice Scott P. Myren



SOUTH DAKOTA SUPREME COURT

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